

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Harry Niska,

Complainant,

vs.

Bonn Clayton,

Respondent.

**NOTICE OF DETERMINATION OF
PRIMA FACIE VIOLATION
AND
PREHEARING CONFERENCE**

TO: Parties on the Attached Service List:

On November 7, 2012, Harry Niska filed a Campaign Complaint with the Office of Administrative Hearings alleging that Bonn Clayton violated Minnesota Statutes §§ 211B.02 (false endorsement) and 211B.06 (false campaign material) in connection with campaign material he prepared and/or disseminated regarding candidates for judicial office in the 2012 primary and general elections.

After reviewing the Complaint and attached exhibits, the undersigned Administrative Law Judge has determined that the Complaint sets forth *prima facie* violations of both Minn. Stat. §§ 211B.02 and 211B.06. This determination is described in more detail in the attached Memorandum.

THEREFORE, IT IS HEREBY ORDERED AND NOTICE IS HEREBY GIVEN that this matter is scheduled for a telephone scheduling conference to be held by telephone before the undersigned Administrative Law Judge at **10:00 a.m. on Thursday, December 13, 2012.** The scheduling conference will be conducted by telephone conference call. At the appointed time, you must call: **1-877-985-9309.** When the system asks for your numeric pass code, enter **544-169-9282#** on your phone and you will be connected to the conference.

At the prehearing conference, preliminary matters will be addressed such as identifying the issues to be resolved, the number of potential witnesses and exhibits should the matter proceed to hearing, possible dates for the hearing, and determining whether the matter may be disposed of without an evidentiary hearing.

Any party who needs an accommodation for a disability in order to participate in this hearing process may request one. Examples of reasonable accommodations include wheelchair accessibility, an interpreter, or Braille or large-print materials. If any

party requires an interpreter, the Administrative Law Judge must be promptly notified. To arrange an accommodation, contact the Office of Administrative Hearings at P.O. Box 64620, St. Paul, MN 55164-0620, or call 651-361-7900 (voice) or 651-361-7878 (TDD).

Dated: November 13, 2012

s/Jeanne M. Cochran
JEANNE M. COCHRAN
Administrative Law Judge

MEMORANDUM

Respondent Bonn Clayton is the former chair of the Minnesota Republican Party's Judicial Elections Committee. The Complaint alleges that Respondent maintains a website at www.judgeourjudgesmn.com where he posts campaign and other political material.

Minn. Stat. § 211B.02 (false support/endorsement) Allegations

The Complaint states that at the Minnesota Republican Party State Convention in May 2012, Mr. Clayton presented the Judicial Elections Committee report to the delegates and recommended they endorse specific candidates for the Minnesota Supreme Court in the 2012 primary and general elections. Despite Mr. Clayton's recommendation, the delegates voted not to endorse any candidate for statewide judicial office in 2012.¹

The Complaint states further that, sometime prior to August 16, 2012, Mr. Clayton was removed from his position as chair of the Republican Party's Judicial Elections Committee. The Complaint alleges that after his removal as chair, Mr. Clayton used party resources to prepare and disseminate e-mails to Republican Party delegates and alternates that falsely implied the Republican Party of Minnesota endorsed Dan Griffith, Tim Tingelstad, and Dean Barkley for Minnesota Supreme Court.²

Specifically, in an email to Republican delegates and alternates dated October 18, 2012, Respondent promoted a "Judicial Voter Guide" available at the www.judgeourjudgesmn.com website that recommended candidates for Supreme Court for "Party leaders." In the email, Mr. Clayton instructed Republican delegates and alternates to "send this link to all of your BPOU's precinct delegates and alternates and Caucus Attendees, so that Republican voters will be able to vote for the right

¹ Complaint Exs. 1 and 2.

² Complaint Ex. 3

candidates.”³ Mr. Clayton signed the email: “Bonn Clayton, Convener, Judicial District Republican Chairs, Republican Party of Minnesota.” The Judicial Voter Guide recommended that Republicans vote for Dan Griffith, Tim Tingelstad, and Dean Barkley for Minnesota Supreme Court.

In response to Mr. Clayton’s email, the Republican Party of Minnesota sent out its own email explaining that Respondent had no authority to create a “voters’ guide” on behalf of the Republican Party. The email explained further that the Republican Party of Minnesota had created its own judicial voter guide which did not endorse any individual candidate.⁴

The Complaint alleges that on October 27, 2012, the Respondent updated his website, www.judgeourjudgesmn.com, and again encouraged Republicans to vote for Supreme Court candidates Griffith, Tingelstad and Barkley. Mr. Clayton referred to the voters’ guide as having been prepared by the “Republican Party of Minnesota – Judicial District Chairs Committee” and he identified himself as the “Convener” of this group.⁵ The Respondent also included a disclaimer on the website that stated: “Prepared and paid for by the Republican Party of Minnesota-Judicial District Chairs Committee.”⁶

According to the Complaint, shortly after October 27, 2012, a representative of the Republican Party of Minnesota contacted the Respondent and told him that his use of the name “Republican Party of Minnesota” on his website may violate Minnesota Statutes § 211B.02. The Respondent thereafter changed the disclaimer on his website to state: “prepared and paid for by the First Judicial District Republican Committee of the Republican Party of Minnesota.”

The Complaint alleges that between November 1 and November 2, 2012, the Respondent sent a series of emails to the same Republican Party email list encouraging Republicans to vote for Griffith, Tingelstad and Barkley.⁷ The emails indicated they were sent from “Minnesota Judicial District Republican Chairs.”⁸

Minn. Stat. § 211B.06 (false campaign material) Allegations

The Complaint alleges that the Respondent disseminated false statements regarding incumbent Supreme Court Justices David Stras and Barry Anderson in emails and on his website as part of the “2012 Minnesota Judicial Voters’ Guide.”

With respect to Justice Stras, the Complaint notes that on the page regarding candidate Tim Tingelstad,⁹ it states:

³ Complaint Ex. 3. (BPOU stands for Basic Political Operating Unit).

⁴ Complaint Ex. 4.

⁵ Complaint Ex. 6.

⁶ *Id.*

⁷ Complaint Exs. 7-10.

⁸ *Id.*

⁹ Complaint Ex. 11.

David Stras supports the plan to replace our constitutional right to meaningful judicial elections with an impeachment process called Merit Selection with Retention Elections.

The Complaint asserts that this statement is verifiably false as Justice Stras has publicly refused to take any position on how judges are selected.¹⁰

With respect to Justice Barry Anderson, Respondent wrote in a November 2, 2012, email that Justice Anderson “voted against Pawlenty on unallotment.”¹¹ The Complaint asserts that this statement is factually false as Justice Anderson joined Chief Justice Gildea’s dissent in support of Governor Pawlenty’s unallotment authority.¹²

The Respondent also wrote that Justice Anderson “voted against Sen. Scott Newman when Newman challenged the validity of a Ramsey County judge’s establishing a State Government Budget during the government Shutdown in 2011.”¹³ The Complaint asserts that this statement is also false. The Complaint states that Justice Anderson did not “vote against” Senator Newman, but instead joined a decision dismissing the case as moot because the Legislature and Governor had resolved the 2011 government shutdown.¹⁴

Finally, the Respondent wrote that Justice Anderson has “consistently supported unconstitutional campaign restrictions on judicial candidates (enacted by the State Supreme Court), which the Republican Party has challenged all the way to the US Supreme Court (and we won!).”¹⁵ The Complaint asserts that this statement is false because Justice Anderson was not on the Minnesota Supreme Court at the time the Court allegedly “enacted” the “campaign restrictions” that the Republican Party of Minnesota challenged “all the way to the US Supreme Court.” The Complaint notes that the case referenced by the Respondent, *Republican Party of Minnesota v. White*¹⁶, was decided in 2002 and Justice Anderson did not join the Minnesota Supreme Court until October 2004.

The Complaint argues that the Respondent intentionally prepared and disseminated false campaign material regarding Justices Stras and Anderson that the Respondent knew was false or did so with reckless disregard as to whether the statements were false.

Legal Standard

To set forth a *prima facie* case that entitles a party to a hearing, the party must either submit evidence or allege facts that, if unchallenged or accepted as true, would

¹⁰ Complaint Ex. 12.

¹¹ Complaint Ex. 10.

¹² *Brayton v. Pawlenty*, 781 N.W.2d 357, 372 (Minn. 2010).

¹³ Complaint Ex. 10.

¹⁴ *Limmer et al. v. Swanson*, Case No. A11-1222 (Minn. Nov. 30. 2011).

¹⁵ Complaint Ex. 10.

¹⁶ 536 US 765 (2002).

be sufficient to prove a violation of chapter 211A or 211B.¹⁷ For purposes of a *prima facie* determination, the tribunal must accept the facts alleged as true and the allegations do not need independent substantiation.¹⁸ A complaint must be dismissed if it does not include evidence or allege facts that, if accepted as true, would be sufficient to prove a violation of chapter 211A or 211B.¹⁹

Minnesota Statutes § 211B.02

Minn. Stat. § 211B.02 provides in relevant part as follows:

211B.02 False Claim of Support.

A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party unit or of an organization.

The issue presented in this case is whether, by creating a title within the Republican Party of Minnesota and by listing the name “Republican Party of Minnesota” on his website and in his emails, the Respondent knowingly implied that the three identified candidates had the support or endorsement of the Republican Party of Minnesota in violation of Minn. Stat. § 211B.02.

The Administrative Law Judge concludes that the Complaint does allege sufficient facts to support finding a *prima facie* violation of Minn. Stat. § 211B.02. This allegation will proceed to a prehearing conference as indicated in the Order.

Minnesota Statutes § 211B.06

Minnesota Statutes § 211B.06 prohibits the preparation and dissemination of false campaign material or paid political advertising with respect to the personal or political character or acts of a candidate. In order to be found to have violated this section, a person must intentionally participate in the preparation, dissemination or broadcast of campaign material or advertising that the person knows is false or communicates with reckless disregard of whether it is false.

As interpreted by the Minnesota Supreme Court, Section 211B.06 is directed against false statements of specific facts.²⁰ The term “reckless disregard” was added to the statute in 1998 to expressly incorporate the “actual malice” standard from *New York Times v. Sullivan*.²¹ Based on this standard, the Complainants have the burden at the

¹⁷ *Barry, et al., v. St. Anthony-New Brighton Independent School District, et al.*, 781 N.W.2d 898, 902 (Minn. App. 2010).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Kennedy v. Voss*, 304 N.W.2d 299, 300 (Minn. 1981); *See, Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language); *Bank v. Egan*, 60 N.W.2d 257, 259 (Minn. 1953); *Hawley v. Wallace*, 163 N.W. 127, 128 (Minn. 1917).

²¹ *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

hearing to show by clear and convincing evidence that the Respondents prepared or disseminated the campaign material knowing that it was false or did so with reckless disregard for its truth or falsity.²²

The Administrative Law Judge concludes that the Complaint has alleged sufficient facts to support finding *prima facie* violations of Minn. Stat. § 211B.06.

This matter will proceed to a prehearing conference on the alleged violations of Minn. Stat. §§ 211B.02 and 211B.06 as indicated in this Order.

J.M.C.

²² *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). See also *Riley v. Jankowski*, 713 N.W. 2d 379 (Minn. App.) review denied (Minn. 2006).